LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 18 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1968

No. 1168

FRANK A. LOMBARDY, et al.,

Appellants,

vs.

PETER KIEWIT SONS' CO., a corporation, and PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellees.

JURISDICTIONAL STATEMENT

HYMAN GOLDMAN,
JERROLD A. FADEM,
GIDEON KANNER,
6505 Wilshire Boulevard
Los Angeles, Calif. 90048
651-3372

Attorneys for Appellants

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1968

No. _____

FRANK A. LOMBARDY, et al.,

Appellants,

vs.

PETER KIEWIT SONS' CO., a corporation, and PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellees.

JURISDICTIONAL STATEMENT

HYMAN GOLDMAN,
JERROLD A. FADEM,
GIDEON KANNER,
6505 Wilshire Boulevard
Los Angeles, Calif. 90048
651-3372

Attorneys for Appellants

TOPICAL INDEX

		Page
Table of Authorities		iii
(A)	OPINIONS BELOW	2
(B)	JURISDICTION	2
(C)	QUESTIONS PRESENTED	3
(D)	STATEMENT OF THE CASE	4
	1. Procedural Posture of the Case	5
	2. Statement of Facts	7
(E)	THE FEDERAL QUESTION RAISED IS SUBSTANTIAL	8
	1. The Conditions Giving Rise to This Appeal Are Nationwide in Scope	8
	2. The Conditions to Which Homes Adjacent to Freeways Are Subjected, Are a Nuisance of Such Proportions as to Amount to a Constitutional Taking of Property	11

Page

3. The Distribution-of-Cost Theory Implicit in the Just Compensation Clause and Sound Policy Compel the Conclusion that Homeowners Should Not be Forced to Involuntarily Subsidize Highway Construction 16

CONCLUSION 21

APPENDIX A

Opinion of the California Court of Appeal, Second Appellate District, Division Three

TABLE OF AUTHORITIES

Cases	Page
Armstrong v. U. S. (1960) 364 U. S. 40	17, 19
B. & O. Ry. Co. v. U. S. (1936) 298 U. S. 364	20
Baltimore & P. R. Co. v. Fifth Baptist Church (1883) 108 U. S. 317	3, 13, 15
Griggs v. County of Allegheny (1962) 369 U. S. 84	3, 14
Monongahela Nav. Co. v. U. S. (1892) 148 U. S. 312	20
Nashville C. & St. L. R. Co. v. Walters (1935) 294 U. S. 405	18
Pennsylvania Coal Co. v. Mahon (1922) 260 U. S. 393	20
Portsmouth Harbor etc. Co. v. United States (1922) 260 U. S. 327	3, 14
Richards v. Washington Terminal Co. (1913) 233 U. S. 546	3-4, 12-15
Rose v. State of California (1942) 19 Cal. 2d 713, 123 P. 2d 505	2
Seaboard Airline R. Co. v. U. S. (1923) 261 U. S. 299	20

Cases	Page
United States v. Causby (1946) 328 U.S. 256	3, 14
U.S. v. Certain Properties, etc. (1966 W.D. Mich) 252 F. Supp. 319	16
U.S. v. General Motors (1945) 323 U.S. 373	15
U.S. v. New River Collieries (1923) 262 U.S. 341	20

Constitutions

United States Constitution:	
Fifth Amendment	6, 12, 15, 17
Fourteenth Amendment	6
California Constitution:	
Art. 1, sec. 14	2
Art. 20, sec. 6	2
Art. 26	18

Statutes

California Civil Code §3482 (West's Annotated Calif. Codes, Vol. 12, p. 623)	3, 6, 16-17

Statutes	Page
Title 23 U. S. C. §§101-136	19
Title 28 U.S. C. §1257(2)	3

Rules

Revised Rules of the United States Supreme Court:	
Rule 16(b)	5

Texts

Lewis on Eminent Domain Vol. 1 (3rd Ed.) sec. 65, pp. 56-58	16
Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law 80 Harv. L. R. 1165 (1967)	17
Nichols on Eminent Domain (3rd Ed.) Vol. 2, sec. 6.3	15
Prosser, Private Action for Public Nuisance, 52 Va. L. R. 997-998 (1966)	15
Prosser on Torts (3rd Ed.) pp. 592-593	14
Reich, The Law of the Planned Society 75 Yale L. J. 1227-29 (1966)	9

Texts	Page
Restatement of Torts, sec. 822	15
Stoebuck, Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect, 71 Dickinson L. R. 207 (1967)	15

Miscellaneous

A Rising Furor Over Superhighways; U. S. News & World Report, November 27, 1967, p. 15	8
Bronson, How to Kill a Golden State, pp. 104-105 (1968)	10
California State Highway System Financing, Publication of the State Division of Highways, 1968	19
Fighting the Freeway, Newsweek, March 25, 1968 pp. 65-66	8
Getze, Freeway Fumes May Reduce Driver Ability, Official Says, Los Angeles Times, Feb. 11, 1968, p. 3	11
Halprin, Freeways (1966 Rheinhold Pub. Corp.)	10
Hardnosed Highwaymen Ride Again, Life, April 14, 1967, p. 4	8

Miscellaneous

	Page
Interstate 87, Atlantic Monthly, Sep. 1967, pp. 104-9	8
Motorists Lose Bit of Everything on Freeways, Los Angeles Times, Nov. 17, 1968, Part V, p. 5	12
Otten, Concrete Catastrophes, The Wall Street Journal, Feb. 25, 1969, p. 14	10
Reconciling the Conflict of Highways and Cities, The Reporter, February 8, 1968	8
Skow, The Highwaymen Come to Morristown, Saturday Evening Post, April 9, 1966, p. 68	8-9
Wilbur Smith & Associates, Future Highways and Urban Growth, p. 292 (1961)	17
30 Town Hall Journal (Los Angeles) Oct. 29, 1968, p. 288	9
Trouble Ahead for Freeways in Cities, U.S. News & World Report, April 4, 1966, p. 8	8
U.S. Road Plans Periled by Rising Urban Hostility, New York Times, Nov. 13, 1967, p. 1	8

Miscellaneous	Page
Whalen, The American Highway: Do We Know Where We're Going, Saturday Evening Post, Dec. 14, 1968, p. 22	9

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1968

No. _____

FRANK A. LOMBARDY, et al.,
Appellants,

vs.

PETER KIEWIT SONS' CO.,
a corporation, and PEOPLE OF THE
STATE OF CALIFORNIA, acting by and
through the Department of Public Works,
Appellees.

JURISDICTIONAL STATEMENT

Appellants submit this Jurisdiction Statement to show that the Supreme Court of the United States has jurisdiction of appeal herein, and that a substantial question is presented.

(A) OPINIONS BELOW

The opinion of the Court of Appeal of the State of California is reported in 266 Cal. App. 2d ___, 266 A. C. A. 652, 72 Cal. Rptr. 240. The Supreme Court of California denied Appellants' Petition for Hearing without opinion.

(B) JURISDICTION

(i) This is an inverse condemnation action, seeking compensation for damages, including physical damage, to Appellants' homes and for deprivation of the use and enjoyment of their property. Such action may be brought in California directly under the authority of Art. 1, §14, and Art. 20, §6, of the State Constitution, and requires no statutory authorization. Rose v. State of California (1942) 19 Cal. 2d 713, 123 P. 2d 505.

(ii) The judgment sought to be reviewed is that of the California Court of Appeal. Said judgment was filed and entered on October 17, 1968. A timely Petition for Rehearing was duly filed on November 1, 1968, and was denied by the Court of Appeal on November 13, 1968. A timely Petition for Hearing was duly filed in the Supreme Court of California on November 22, 1968, and was denied on December 11, 1968. A Notice of Appeal to the Supreme Court of the United States was filed in the California Court of Appeal, Second Appellate District, on January 15, 1969.

(iii) This appeal is brought pursuant to the provisions of 28 U.S.C. §1257(2).

(iv) Cases believed to sustain the jurisdiction of the United States Supreme Court are: Baltimore & P.R. Co. v. Fifth Baptist Church (1883) 108 U.S. 317; Richards v. Washington Terminal Co. (1913) 233 U.S. 546; Portsmouth Harbor etc. Co. v. United States (1922) 260 U.S. 327; United States v. Causby (1946) 328 U.S. 256; Griggs v. County of Allegheny (1962) 369 U.S. 84.

(v) The statute involved herein is §3482 of the California Civil Code (West's Annotated Calif. Codes, Vol. 12, p. 623), which provides:

> "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

(C) QUESTIONS PRESENTED

1. Is §3482 of the California Civil Code constitutional:

   (a) On its face, to the extent it purports to grant to the legislature a carte blanche to "confer immunity for a private nuisance of such character as to amount in effect to a taking of

private property for public use? 1/

(b) As applied herein, to the extent it purports to deny just compensation to owners of homes which by the construction and operation of an adjacent freeway have been subjected to noxious fumes, loud noise, dust-laden air, shocks and vibrations, imminent hazards from foreseeable accidents on an adjoining above-grade freeway, causing loss of sleep, eye irritation, difficulty in hearing, and causing physical damage to the homes and their contents, and thereby depriving the owners of the use and enjoyment of their property, and reducing the market value thereof.

(D) STATEMENT OF THE CASE

Appellants (hereafter Homeowners) are nine couples who are owners of single family homes in Santa Fe Springs, a modest suburban area of Los Angeles (CT 90-92). 2/ Appellees are the

---

1/ The quoted language is from Richards v. Washington Terminal Co., supra, 233 U.S. at 553.

2/ The abbreviation CT refers to Clerk's Transcript, the record upon which the instant case was appealed to the California courts. (Continued)

State of California acting through its Department of Public Works (hereafter State) and Peter Kiewit Sons' Co. (hereafter Kiewit), the State's contractor (CT 89).

Stated concisely, the instant action is one in inverse condemnation, whereby Homeowners seek to recover compensation for damages inflicted on their property by the State's and Kiewit's construction and operation of a freeway in proximity to Appellants' homes.

1. Procedural Posture of the Case

It should be noted preliminarily that the appeal in the state courts was from a judgment of dismissal following the sustaining of a demurrer without leave to amend to Homeowners' Third Amended Complaint (CT 124). Procedurally, this has two consequences on appeal in the state courts: (a) The facts alleged in the Homeowners' Third Amended Complaint are presumed true, and (b) only the Third Amended Complaint is reviewed on appeal in the state courts.

For purposes of compliance with Rule 16(b) it should be noted that Homeowners duly raised

---

2/ (continued) Numbers following the letters CT designate pages of the Clerk's Transcript. The entire Clerk's Transcript is included in the record on appeal to the United States Supreme Court.

the federal question (i. e. the taking of property without compensation) in Homeowners' original pleading (CT 5) as well as in their superseded First Amended Complaint (CT 29-30) and Second Amended Complaint (CT 61). The same is true of the Third Amended Complaint (CT 94). Inasmuch as in California pleadings must contain factual averments, and legal conclusions are impermissible, Homeowners timely raised and throughout argued the federal questions, including specifically the unconstitutionality of California Civil Code §3482, by memoranda of law filed in connection with the Superior Court's consideration of the various demurrers (See CT 135, 136-139, 175, 205 (lines 12-16), 245, 246-248, 250-251).

The federal question was duly raised before the California Court of Appeal by the respective briefs and arguments. Under California practice there are no formal assignments of error; asserted errors are discussed in briefs and arguments. In the Court of Appeal Homeowners expressly continued to argue the unconstitutionality of Civil Code §3482, particularly as applied to them, as repugnant to the due process and just compensation clauses of the United States Constitution.

The California Court of Appeal in its opinion expressly acknowledges Homeowners' reliance on the Fifth and Fourteenth Amendments of the United States Constitution (p. A-2, infra), and Homeowners' reliance on "a number of cases of the United States Supreme Court" (p. A-4, infra).

2. Statement of Facts

The substantive facts of the case at bench are as simple as they are devastating to the Homeowners.

The Third Amended Complaint is found at CT 89-95. In substance (and insofar as material to this appeal) it alleges that the State and Kiewit, by means of construction and operation of the San Gabriel River Freeway in the vicinity of Homeowners' dwellings, subjected Homeowners and their homes to noxious fumes, loud noise, dust-laden air, *shocks and vibrations*, and imminent hazards from foreseeable accidents on the freeway (CT 92-93).

These conditions caused the Homeowners' dwellings and contents thereof to sustain physical damage, and subjected Homeowners to loss of sleep, eye irritation, difficulty in breathing and hearing (CT 93).

By reason of these facts Homeowners were rendered unable to fully use their land due to noise and dirt from the freeway and fear of cars and debris coming down the freeway embankment (CT 94).

Moreover, by reason of the above circumstances, the market value of Homeowners' property has been reduced and impaired (CT 94).

Homeowners received no compensation for any of the damages thus suffered.

(E) THE FEDERAL QUESTION RAISED IS SUBSTANTIAL

1. The Conditions Giving Rise to This Appeal Are Nationwide in Scope

Few issues of the recent years have caused as much turmoil across the country as the impact of freeways on densely populated areas. Fueled by billions of federal-aid dollars, the highway builders have been slashing across towns and suburbs, with callous disregard for those in the path of the, by now proverbial, concrete juggernaut.

The foregoing words may, at first blush, smack of an advocate's rhetoric. They are, if anything, inadequate to describe either the intensity or the extent of the problem. By way of example see: "Trouble Ahead for Freeways in Cities", U.S. News & World Report, April 4, 1966, p. 8; "Fighting the Freeway", Newsweek, March 25, 1968, pp. 65-65; "Hardnosed Highway men Ride Again", Life, April 14, 1967, p. 4 (editorial); "A Rising Furor Over Superhighways U.S. News & World Report, November 27, 1967, p. 15; "Reconciling the Conflict of Highways and Cities", The Reporter, Feb. 8, 1968; "U.S. Road Plans Periled by Rising Urban Hostility", New York Times, Nov. 13, 1967, p. 1; "Interstate 87", Atlantic Monthly, Sep. 1967, pp. 104-9; Skow, "The 'Highwaymen Come to Morristown", Saturday Evening Post, April 9, 1966,

p. 68; Whalen, "The American Highway: Do We Know Where We're Going", Saturday Evening Post, Dec. 14, 1968, p. 22.

Particularly see Reich, "The Law of the Planned Society", 75 Yale L. J. 1227-29 (1966), which graphically describes repeated instances of physical violence between otherwise respectable citizens and the authorities over community spoilation threatened by freeways.

Nor has criticism been emanating solely from the victims and impartial observers. The arrogant disregard of the highway builders for the communities they bulldoze has evoked critical words from more responsible members of their own ranks. In addressing the Town Hall in Los Angeles on October 10, 1968, then Secretary of Transportation, Alan S. Boyd, forthrightly acknowledged the problem:

> "We are learning that highways have a critical impact upon the total environment; unless they are carefully planned they can ruin neighborhoods, add to pollution, displace thousands of poor people, absorb valuable park land, and promote congestion instead of relieving it." 30 Town Hall Journal (Los Angeles) Oct. 29, 1968, p. 288.

Others who have studied the problem have likewise delivered a scathing judgment:

> "Freeways have done terrible things to cities in the past decade, and in

many instances have almost irrevocably destroyed large sections of the cities which they were meant to serve. On the social level, they not only have often devastated, more completely than any bombing, vast acreages of houses which provided needed low cost housing for families who could not afford higher rents, but they have also wrecked neighborhoods whose old buildings had great character and charm.

* * * The freeway in the city has been a great destroyer of neighborhood values."

Halprin, "Freeways" (1966, Rheinhold Pub. Corp.)

The foregoing expressions are but a sample of a large body of concerned public and informed opinion which recognizes the stark reality that freeways, in addition to serving[3/], can and often do devastate. And the victims of that devastation are people innocent of any wrong-doing, who by chance find themselves in the path of a line, more or less arbitrarily drawn on a map by a faceless engineer whose acts are not subject to review.

3/ Some of the more astute observers have noted that those served above all by freeways are the trucking and concrete industries. See Bronson, "How to Kill a Golden State", pp. 104-105, (1968); Otten, "Concrete Catastrophes", The Wall Street Journal, Feb. 25, 1969, p. 14

2. The Conditions to Which Homes Adjacent to Freeways Are Subjected, are a Nuisance of Such Proportions as to Amount to a Constitutional Taking of Property

The case at bench brings before the Court what - in terms of individual injustice - is probably the most unfair aspect of the problems thus generated: the plight of the owner of a modest home which by chance winds up next to a freeway, but is not taken. To such an owner the reality is that what used to be a place of repose for the family, is transformed into a bedlam of noise, surrounded by a polluted atmosphere of smoke, dust and automobile exhaust fumes. 4/ The backyards become incapable of normal use, not only because of the polluted environment, but also because of

---

4/ Recent studies indicate that in areas bordering on urban freeways, atmospheric carbon monoxide contamination reaches levels sufficiently high to produce noticeable biological effects, including impairment of judgment. Getze, "Freeway Fumes May Reduce Driver Ability, Official Says", Los Angeles Times, Feb. 11, 1968, p. 3

constant danger of debris coming down the freeway embankment. 5/ In time the homes exhibit physical damage from the constant vibrations, and the paint and contents of the homes become damaged by the fumes and dust. Necessarily, the value of the homes decreases, striking those least able to afford it a devastating financial blow.

In a nutshell, it is Appellants' contention that these things - upon sound legal principle - constitute an interference with property, of such dimensions as to constitute a "taking" within the meaning of the Fifth Amendment, and require the payment of just compensation. Therefore, legislation - such as the statute attacked by this appeal - which purports to abrogate this right to just compensation is necessarily repugnant to the Constitution. This conclusion is based directly upon the reasoning of this Court in Richards v. Washington Terminal Co. (1913) 233 U.S. 546, 552.

> "But the legislation we are dealing with must be construed in the light of

---

5/ Freeways are prodigious debris producers. Highway officials estimate that freeway debris in the Los Angeles area runs into the hundreds of tons per year. "Motorists Lose Bit of Everything on Freeways", Los Angeles Times, Nov. 17, 1968, Part V, p. 5. Additionally, accidents cause cars to hurtle down freeway embankments, and accident-caused gasoline spillage and fires are not uncommon.

the provision of the 5th Amendment - 'nor shall private property be taken for public use without just compensation' - and is not to be given an effect inconsistent with its letter or spirit. The doctrine of the English cases has been generally accepted by the courts of this country, sometimes with scant regard for distinctions growing out of the constitutional restrictions upon legislative action under our system. Thus, it has been said that 'a railroad authorized by law and lawfully operated cannot be deemed as a private nuisance'; that 'what the legislature has authorized to be done cannot be deemed unlawful', etc. These and similar expressions have at times been indiscriminately employed with respect to public and private nuisances. We deem the true rule, under the 5th Amendment, as under state constitutions containing a similar prohibition, to be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such character as to amount in effect to a taking of private property for public use."

Richards was but an expression of a settled principle. In Baltimore & P. R. Co. v. Fifth Baptist Church (1883) 108 U. S. 317, 332, the Court held:

"The acts that a Legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large." (Emphasis added)

Since then, this Court has held repeatedly that acts amounting to a substantial interference with the use and enjoyment of one's property, can amount to a constitutional "taking" although the owner is not physically dispossessed nor divested of title. Portsmouth Harbor etc. Co. v. U.S. (1922) 260 U.S. 327; U.S. v. Causby (1946) 328 U.S. 256; Griggs v. County of Allegheny (1962) 369 U.S. 84. And such "taking" can be accomplished as well by subjecting the aggrieved owner's land to smoke and fumes (Richards v. Washington Terminal Co., supra, 233 U.S. at 556-557), as well as by noise (Causby, Griggs). In other words, the "taking" may be accomplished by the kind of interference traditionally known in the law of property as nuisance. 6/ Physical

6/ Because of the imprecision with which the word "nuisance" is often employed (see, Prosser on Torts (3rd Ed.), pp. 592-593), it must be made clear that the word "nuisance" (continued)

"taking" is thus unnecessary to invoke the just compensation clause of the Fifth Amendment. This is the settled view. See Nichols on Eminent Domain (3rd Ed.), Vol. 2, §6.3, "Non-physical Takings", p. 407; Lewis on Eminent Domain Vol. 1, (3rd Ed.), §65, pp. 56-58. For a more comprehensive discussion of this point see Stoebuck, "Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect", 71 Dickinson L. R. 207, 217-222, (1967). This is consistent with the doctrine that "property" is not a thing but a group of rights. U. S. v. General Motors (1945) 323 U. S. 373, 377-378. Also see, Stoebuck, op. cit., 71 Dickinson L. R. at 209-217.

The right to be free of nuisance impairing an individual's rights of property, is within protection of the Constitution and thereby impervious to legislative enactments purporting to confer immunity upon the perpetrator of the nuisance. Baltimore & P. R. Co. v. Fifth Baptist Church, supra, 108 U. S. at 331-332; and Richards v. Washington Terminal Co., supra, 233 U. S. at 552-53.

6/ (Continued) as used by Appellants refers to interference with property, as defined in Restatement of Torts §822. Also see, Prosser, "Private Action for Public Nuisance", 52 Va. L. R. 997-998 (1966).

3. The Distribution-of-Cost Theory Implicit in the Just Compensation Clause and Sound Policy Compel the Conclusion that Homeowners Should Not be Forced to Involuntarily Subsidize Highway Construction

To the above discussion of legal principle there must be added a few thoughts as to policy. These go directly to the importance of the issues presented to the Court.

It thus being established that nuisance (i. e., interference with the use of property), can amount to a constitutional "taking", it follows necessarily that to adjudicate the rights of the litigants in such a case, a court must hear evidence going to the intensity and extent of the interference. Unless this is done a court cannot tell whether a "taking" has occurred. 7/ But in the case at bench Appellants' action was dismissed on a demurrer without any inquiry into the merits.

It is submitted that the invocation of California Civil Code §3482 to accomplish such result, amounts to a declaration of legislative

---

7/ For an example of judicial pragmatism on this point see U. S. v. Certain Properties, etc. (1966, W. D. Mich.) 252 F. Supp. 319.

power to repeal - at least pro tanto - the just compensation clause of the Fifth Amendment. It follows that California Civil Code §3482 is repugnant to the Constitution on its face and certainly as applied to Appellants.

It is settled rationale of the concept of just compensation in eminent domain, that an individual whose property is adversely affected by a governmental course of conduct in the creation of public projects, should not be forced "... to bear public burdens which, in all fairness and justice should be borne by the public as a whole." Armstrong v. U.S. (1960) 364 U.S. 40, 49. Also see Michelman, "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law", 80 Harvard L.R. 1165, 1181 (1967).

The case at bench is a conspicuous example of the antithesis of the above principle. Here, a group of families of modest means is being forced to shoulder a disproportionate share of the economic burden of highway construction. In plain English, these families are being forced to subsidize the highway users, particularly the trucking industry. 8/

8/ Studies performed under the auspices of the Automobile Manufacturers Association indicate that trucks reap a windfall on Los Angeles freeways, saving almost 10¢ per mile (9.93¢ to be exact). Wilbur Smith & Associates, "Future Highways and Urban Growth", p. 292, (1961).

In the past this Court perceptively noted the changing realities of transportation technology. In Nashville, C. & St. L. R. Co. v. Walters (1935) 294 U.S. 405, the impact of the emerging highway network on railroads was analyzed, and the Court balanced their competing needs and burdens. It is submitted that the relentless slashing of freeways through densely populated areas has brought about a situation where the distribution of burdens between the freeway builders and those in the freeways' path likewise needs a fresh judicial look.

In Nashville C. & St.L. R. Co. v. Walters, supra, the Court held that the Tennessee legislature could not force an unfair share of grade-crossing costs upon the shoulders of railroads, and to the unfair advantage of the highway system. Likewise, in the case at bench it should be recognized that it is even more unfair to force a disproportionate economic burden of freeway construction upon those who derive no direct benefit therefrom, and who are least able to bear the resulting economic burden. Today's conditions have changed: the burgeoning highway-building program is no delicate flower in need of judicial protection. That protection is needed for those who must live in the aftermath created by the freeway builders' bulldozers.

In California such disproportionate economic burdening of the freeways' neighbors is particularly unjust, because California highways are to be paid for solely by their users. Article 26 of the California Constitution requires that

fuel tax and license fee revenues be devoted solely to highway purposes. Those revenues (and federal aid funds) are the sole source of highway funds in California. "California State Highway System Financing", Publication of the State Division of Highways, 1968.

Thus, any shift of highway building costs from the highway users onto others [9], constitutes not only a violation of the distribution-of-cost principle of Armstrong, supra, 364 U.S. at 49, but also outright invidious discrimination in favor of highway users at the expense of others. We respectfully ask the Court to bear in mind that most of the highways in question are built with federal funds. See Title 23 U.S.C. §§101-136. It is adding insult to injury, for a state to use such funds in so plainly discriminatory a fashion, to say nothing of the denial-of-equal-protection aspects thereof.

Appellants recognize, as they must, that some of the ramifications of the broader problems involved here go beyond the scope of a judicial proceeding. None of this, however, must obscure the fundamental principle that when society builds public works, society as a whole should bear the economic burden which goes with the benefit. This is what "just

---

9/ It is, of course, basic economics that the cost of highways is the same regardless of whether compensation is paid. Payment or non-payment of just compensation merely shifts the incidence of that cost.

compensation" is ultimately all about. And "just compensation" is the exclusive province of the Courts; it cannot be curtailed by legislatures. 10/

Mr. Justice Holmes probably put it best when he said:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."
>
> Pennsylvania Coal Co. v. Mahon (1922) 260 U.S. 393, 416.

In short, it is bad policy for the many to abuse the few.

10/ Monongahela Nav. Co. v. U.S. (1892) 148 U.S. 312, 327; Seaboard Airline R. Co. v. U.S. (1923) 261 U.S. 299, 304; U.S. v. New River Collieries (1923) 262 U.S. 341, 343; B & O. Ry. Co. v. U.S. (1936) 298 U.S. 364, 365.

CONCLUSION

Putting aside the foregoing arguments of law and policy, Appellants submit that they have been unfairly and unjustly dealt with. The court whose opinion is sought to be reviewed here, expressly acknowledged this lamentable fact. It characterized the conditions imposed upon Appellants as "obnoxious", yet held that "they must be endured without redress", without so much as a word of reason or rationale.

In a society in which people in alarming numbers are turning away from rational judicial tools of conflict-resolution, such a judicial attitude toward palpable injustice will not do. The task of defining and applying the rules of just compensation belongs to the courts; it cannot be taken away by an over-broad legislative act.

The questions presented are substantial and timely.

Appellants respectfully pray that probable jurisdiction be noted by the Court.

Respectfully submitted,

HYMAN GOLDMAN
JERROLD A. FADEM
GIDEON KANNER

Attorneys for Appellants

[Civ. No. 31774. Second Dist., Div. Three. Oct. 17, 1968.]

FRANK A. LOMBARDY et al., Plaintiffs and Appellants, v. PETER KIEWIT SONS' CO. et al., Defendants and Respondents.

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard L. Wells, Judge. Affirmed.

Action for damages allegedly sustained as a result of the construction and operation of a freeway. Judgment of dismissal after demurrers to third amended complaint were sustained without leave to amend affirmed.

Fadem & Kanner and Gideon Kanner for Plaintiffs and Appellants.

Veatch, Carlson, Dorsey & Quimby, Robert P. Dorsey, Henry F. Walker, Harry S. Fenton, R. B. Pegram, Joseph A. Montoya, Richard L. Franck, Charles E. Spencer, Jr., and Jack M. Miller for Defendants and Respondents.

SHINN, J.*—The action is for damages claimed to have been sustained as a result of the construction and operation of the San Gabriel River Freeway in Los Angeles County. Plaintiffs are the owners of property adjacent to the freeway; defendants are the State of California and Peter Kiewit Sons' Co., a corporation. Plaintiffs are husbands and their wives who own, separately, 4 lots in Tract 16943; 4 lots in Tract 16944 and one lot in Tract 16914. The state, by and through the Department of Public Works, installed the freeway; Peter Kiewit Sons' Company was the contractor under contract with the state.

The complaint (third amended) purports to state a cause of action for physical damage to the real property of plaintiffs, for damage to their rights under tract restrictions and for detriment caused them upon the theory that the freeway constitutes a nuisance.

The demurrers of the defendants to the third amended complaint were sustained without leave to amend, judgment was

*Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

entered in favor of the defendants and plaintiffs appeal. We have concluded that the complaint fails to state a cause of action upon any theory and that the judgment should be affirmed.

With respect to the alleged damage to the real property of plaintiffs the action is in inverse condemnation and compensation is claimed under Article 1, section 14 of the California Constitution, the Fifth and Fourteenth Amendments of the United States Constitution and state legislation.

The requisites of a complaint in inverse condemnation are stated in [1]Chadbourn, Grossman and Van Alstyne, California Pleading, section 896, pp. 850-851, as follows:

The complaint reads in part as follows:

"6

"In the process of construction and operation of the above described freeway and as a proximate, direct and necessary result of the plan, design, execution, construction, maintenance and operation thereof, Defendants used or caused to be used various machinery, equipment, labor and materials, in a manner which the Plaintiffs do not know to have been or not been required by the plans and specifications and the precise nature of which is not known to Plaintiffs but all of which is known to Defendants. Thereby Plaintiffs and their property have been subjected to noxious fumes, loud noise, dust-laden air, shocks and vibrations, imminent hazards from foreseeable accidents and collisions on the freeway, and mental, physical and emotional distress, resulting therefrom. The above-described acts and conditions have caused loss of sleep, eye irritation, difficulty in breathing, difficulty in hearing conversations and broadcasts, and have been an unceasing source of worry, disturbance and irritation. . . .

[1]"A mere general allegation that in the course of constructing a public improvement the defendant damaged or took the plaintiff's land is insufficient to state a cause of action in inverse condemnation. A considerable volume of litigation has documented the fact that the line between compensable takings and damagings and those which are regarded as *damnum absque injuria* is indeed a fine one marked by narrow and in some cases apparently arbitrary factual distinctions. In order to clarify the issues, and to eliminate so far as possible those claims which are founded on noncompensable takings or damagings, it is thus desirable and consistent with efficient judicial administration to plead the facts showing what the defendant did and how the injury occurred in specific detailed allegations. In view of the fine distinctions drawn in the substantive law of inverse condemnation, the pleader's primary concern should be directed toward stating the facts in a manner which will correspond to some recognized theory of compensable damages."

"13"

"That as a proximate result of said acts by the Defendants and each of them, Plaintiffs have sustained and incurred and are certain in the future to sustain and incur, losses, injuries and damages to real property and person in excess of $5,000.00 per Plaintiff, the exact amount of which presently cannot be ascertained. Plaintiffs request leave of court to amend this Complaint to insert the amount thereof when the same has been ascertained."

[1] There was no allegation that the land of plaintiffs had sunk or shifted, the foundations of the houses had sunk, that walls had been cracked, windows broken or that the buildings had sustained any other type of injury or damage.

The allegation that the described acts of defendants have caused "damages to real property and person in excess of $5,000.00 per Plaintiff" was not an allegation that the real property of plaintiffs has sustained damage in any substantial amount.

No recovery in inverse condemnation may be had unless damage in a substantial amount to the property itself has been sustained. (*Albers* v. *County of Los Angeles*, 62 Cal.2d 250 [42 Cal.Rptr. 89, 398 P.2d 129]; *Frustuck* v. *City of Fairfax*, 212 Cal.App.2d 345, 364 [28 Cal.Rptr. 357].)

[2] The mental, physical and emotional distress allegedly suffered by plaintiffs by reason of the fumes, noise, dust, shocks and vibrations incident to the construction and operation of the freeway does not constitute the deprivation of or damage to the property or property rights of plaintiffs for which they are entitled to be compensated. In *People* ex rel. *Department of Public Works* v. *Symons*, 54 Cal.2d 855, 860-862 [9 Cal.Rptr. 363, 357 P.2d 451], it was said: "It is established that when a public improvement is made on property adjoining that of one who claims to be damaged by such general factors as change of neighborhood, noise, dust, change of view, diminished access and other factors similar to the damages claimed in the instant case, there can be no recovery where there has been no actual taking or severance of the claimant's property. (*Bacich* v. *Board of Control*, 23 Cal.2d 343 [144 P.2d 818]; *Rose* v. *State, supra*, 19 Cal.2d 713 [123 P.2d 505]; *Eachus* v. *Los Angeles etc. Ry. Co., supra*, 103 Cal. 614, 617 [37 P. 750, 42 Am.St.Rep. 149]; *Reardon* v. *San Francisco*, 66 Cal. 492, 506 [6 P. 317, 56 Am.Rep. 109].)" Later cases are in accord. (*Albers* v. *County of Los Angeles, supra*, 62 Cal.2d 250; *Breidert*

v. *Southern Pac. Co.*, 61 Cal.2d 659 [39 Cal.Rptr. 903, 394 P.2d 719]; *Katcher* v. *Home Sav. & Loan Assn.*, 245 Cal.App. 2d 425 [53 Cal.Rptr. 923].)

[3a] It was alleged in the complaint that the construction and operation of the freeway created an eyesore and "It also interferes with and obstructs the view of and from Plaintiffs' homes and is an unsightly change in the character of the Plaintiffs' neighborhood in violation of deed restrictions of Tracts No. 16194, 16943, and 16944, which restrictions limit the uses within the Tracts to single family residential and non-offensive activities." It was alleged that plaintiffs have been deprived of their property rights in the tract restrictions and have not been paid compensation for loss of the same.

Appellants are contending for an extravagant extension of the rights created by the customary restrictions upon the use of property in residential subdivisions. If such restrictions constituted property rights free from any type of interference, every owner of a lot in a restricted tract would have to be a party to a grant of a right of way, or an action to condemn the same, over any portion of the tract. No such roadblock to the development of local and state transportation systems exists.

Under the heading "Governmental interference with property owners rights under deed restrictions is a compensable taking and damaging of property" appellants say, "Poised in the path of appellants' argument on the point suggested by the above headline, is the 37-year-old decision in *Friesen* v. *Glendale* (1930) 209 Cal. 524 [288 P. 1080], holding that deed restrictions are not compensable because they are not property but rights of a contractual nature. Nevertheless, appellants respectfully submit that this court should reach a contrary result for the following reasons. . . ." Appellants then cite a number of cases of the United States Supreme Court, contending that they abrogate the rule declared in *Friesen*.

The opinion in *Friesen* discusses the nature of building restrictions as negative easements or equitable servitudes as it has long been recognized and defined in California law.

In *Friesen* it was sought to enjoin the installation of a street through a subdivision upon the ground that the same would violate rights of the lot owners under restrictions "That said premises shall be used for residence purposes only." The basis of the court's holding was expressed in the

following statements (pp. 529-530): "[5] It is also well established that the 'provisions of an instrument creating or claimed to create such a servitude will be strictly construed, any doubt being resolved in favor of the free use of the land.' (*Werder* v. *Graham*, 181 Cal. 174 [183 P. 945]; 7 Cal.Jur., p. 733.) This rule would seem to be especially applicable where the title to the land is acquired by a municipality for public street purposes. To construe the instrument strictly in favor of the servitude would impose upon the city the obligation to use the land acquired for residential purposes only, a use to which the city obviously has no power to devote land acquired for street purposes. A construction strictly against the covenant would permit the city to acquire the land freed from the restriction. [6] Furthermore, a duly enacted law providing for such a restriction, binding upon private parties, is not binding upon the sovereign unless it appear expressly or by necessary implication that the sovereign consented to be so bound. (*C. J. Kubach Co.* v. *McGuire*, 199 Cal. 215 [248 P. 676].) Much less would the city be bound by the terms of a private contract to which it was in nowise a party." And, further, ". . . parties may not by mutual covenants in private contracts create for themselves an estate in land not known to our law and thus entitle them to compensation where no such right existed before."

[4] It is the law in California that building and use restrictions of a residential tract do not constitute an interest in land vested in the lot owners which is damaged by the construction of a state freeway through the tract.

[3b] The complaint fails to state a cause of action in inverse condemnation.

[5a] Next to be considered is the contention that the defendants have created a nuisance. The facts relied upon are those stated in the paragraphs of the complaint set out above. We must accept as true the allegation that the plaintiffs have suffered mental, physical and emotional distress, irritation and worry as a result of the construction and operation of this freeway. All householders who live in the vicinity of crowded freeways, highways and city streets suffer in like manner and in varying degrees. The roar of automobiles and trucks, the shock of hearing screeching brakes and collisions, and the smoke and fumes which are in proportion to the density of the motor vehicle traffic all contribute to the loss of peace and quiet which our forefathers enjoyed before the invention of the gas engine.

[6] The described conditions occurring on state constructed highways do not constitute a nuisance in a legal sense. State highways are constructed and maintained under the authority of article IV, section 36, of the state Constitution, Government Code, sections 14000, 14001, and Streets and Highways Code, sections 90 et seq. Civil Code section 3482 states "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." In *Larson* v. *Santa Clara Valley Water Conservation Dist.*, 218 Cal.App.2d 515, 526 [32 Cal.Rptr. 875, 8 A.L.R.3d 665], it was held in reliance upon section 3482 that the construction and operation of a dam under legislative authority did not constitute a nuisance. (See *Zeppi* v. *State of California*, 174 Cal.App.2d 484 [345 P.2d 33]; *Vater* v. *County of Glenn*, 49 Cal.2d 815, 820 [323 P.2d 85]; *Liebman* v. *Richmond*, 103 Cal.App. 354, 357 [284 P. 731].)

[5b] The conditions in which appellants complain are obnoxious to all persons who live in close proximity to the state's freeways but they must be endured without redress.

In view of our conclusion that plaintiffs have no cause of action for nuisance when the construction was state authorized, it is unnecessary to discuss the state's argument that plaintiffs have failed to claim detriment special to themselves. It is also unnecessary to discuss the contention that the complaint fails to allege sufficiently that plaintiffs filed a claim against the state under Government Code sections 905.2, 911.2, 945.4 and 945.6.

The complaint purported to allege negligence on the part of Peter Kiewit Sons' Co. in the construction of the freeway. This claim is not pressed on the appeal; it is therefore unnecessary to consider additional arguments of this defendant in support of the judgment in its favor.

The judgment is affirmed.

Ford, P. J., and Moss, J., concurred.

THE BRIEF SHOP
legal printers

10844 VENTURA BLVD.,
POPLAR 3-2965

NORTH HOLLYWOOD
TRIANGLE 7-8620

SUPREME COURT, U. S.

MAR 28 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968
No. 1168

FRANK A. LOMBARDY, *et al.*,

Appellants,

vs.

PETER KIEWIT SONS' Co., a corporation, and PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellees.

On Appeal From the Court of Appeal of the State of California, Second Appellate District, Division Three.

Motion of Appellee Peter Kiewit Sons' Co. to Dismiss or Affirm.

HENRY F. WALKER,
615 South Flower Street,
Suite 806,
Los Angeles, Calif. 90017,
(213) 628-4241,

and

WAYNE VEATCH,
ROBERT C. CARLSON,
ROBERT P. DORSEY,
FREDERICK C. QUIMBY, JR.,
3200 Wilshire Boulevard,
Suite 510,
Los Angeles, Calif. 90005,
(213) 381-2861,

Counsel for Appellee, Peter Kiewit Sons' Co., a corporation.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

SUBJECT INDEX

Page

Statement 2

Argument 5

I.

Appellee Kiewit, the Contractor, Is Not Liable to Appellants for Inverse Condemnation 5

II.

Appellants Failed to Docket Their Case in This Court Within the Time Prescribed by the Revised Rules of This Court 8

Conclusion 12

TABLE OF AUTHORITIES CITED

Cases	Page
Anderson v. Fay Improvement Co., 134 Cal.App.2d 738, 286 P.2d 513	7
Asher v. Pacific Power and Light Co., 249 F.Supp. 671	6
Department of Banking v. Pink, 317 U.S. 264, 87 L.2d 254, 63 S.Ct. 233	10
Johnson v. Florida, 391 U.S. 596, 20 L.ed 2d 838, 88 S.Ct. 1713	11
Katcher v. Home Sav. & Loan Assn., 245 Cal. App. 2d 425, 53 Cal. Rptr. 923	3
Market Street R. Co. v. Railroad Com. of Cal., 324 U.S. 548, 89 L.ed 1171, 65 S.Ct. 770	10
Monks v. Lee, 317 U.S. 590, 87 L.ed 483, 63 S.Ct. 50	10
Pittsburgh Towing Co. v. Mississippi Barge Line, 385 U.S. 32, 17 L.2d 2d 31, 87 S.Ct. 195	11
Rose v. State of California, 19 Cal.2d 713, 123 P. 2d 505	7
Yearsley v. W. A. Ross Construction Co., 309 U.S. 18, 84 L.ed. 554, 60 S.Ct. 413	5, 8

Rules	
California Rules of Court, Rule 24	8
California Rules of Court, Rule 27	8
California Rules of Court, Rule 28	9
Revised Rules of the Supreme Court of the United States, Rule 13	2, 10
Revised Rules of the Supreme Court of the United States, Rule 16(1)(b)	1

Page

Revised Rules of the Supreme Court of the United States, Rule 16(1)(d) 1, 2

Revised Rules of the Supreme Court of the United States, Rule 34(2) 10

Statutes

California Civil Code, Sec. 3482 4

United States Constitution, Fifth Amendment 6

IN THE

Supreme Court of the United States

October Term, 1968
No. 1168

FRANK A. LOMBARDY, *et al.*,

Appellants,

vs.

PETER KIEWIT SONS' CO., a corporation, and PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellees.

On Appeal From the Court of Appeal of the State of California, Second Appellate District, Division Three.

Motion of Appellee Peter Kiewit Sons' Co. to Dismiss or Affirm.

Appellee, Peter Kiewit Sons' Co., a corporation, hereafter referred to as Kiewit, moves: (a) pursuant to Rule 16 (1)(b) to dismiss the appeal as to Kiewit on the ground that it does not present a substantial federal question insofar as relates to said appellee; (b) pursuant to Rule 16 (1)(b) to dismiss the appeal as to Kiewit on the ground that the judgment rests on an adequate non-federal basis insofar as relates to said appellee; (c) pursuant to Rule 16 (1)(d) to dismiss the appeal or to affirm the judgment on the ground that appellee Kiewit, contractor in construction of the freeway for the State of California, is neither liable nor

constitutionally required to be liable to appellants for claimed inverse condemnation; and (d) pursuant to Rule 16 (1)(d) to dismiss the appeal or to affirm the judgment on the ground that appellants failed to docket their appeal within ninety days from the denial of their Petition for Hearing by the California Supreme Court in accordance with the provisions of Rule 13 of this Court.

Statement.

The State of California, through its Department of Public Works, determined to construct a freeway. Appellants are homeowners whose properties were not taken but were in proximity to the freeway. Appellee Kiewit was the contractor engaged by the State in the construction of the freeway running in proximity to appellants' properties.

The Jurisdictional Statement (JS) of appellants states on page 2:

> "This is an inverse condemnation action, seeking compensation for damages, including physical damage, to Appellants' homes and for deprivation of the use and enjoyment of their property. Such action may be brought in California directly under the authority of Art. 1, §14, and Art. 20, §6, of the State Constitution, and requires no statutory authorization. *Rose v. State of California* (1942), 19 Cal.2d 713, 123 P.2d 505."

Appellants also state (JS pp. 4-5):

> ". . . Appellees are the State of California acting through its Department of Public Works (hereafter State) and Peter Kiewit Sons' Co. (hereafter Kiewit), the State's contractor.
>
> "Stated concisely, the instant action is one in inverse condemnation, whereby Homeowners seek

to recover compensation for damages inflicted by the State's and Kiewit's construction and operation of a freeway in proximity to Appellants' homes."

As observed by the California Court of Appeal (JS A-1):

"The state, by and through the Department of Public Works, installed the freeway; Peter Kiewit Sons' Company was the contractor under contract with the state."

Appellants do not and cannot claim that California lacks authority to construct freeways. Neither do they claim that California could not engage appellee Kiewit for the purposes of constructing the freeway nor that said appellee was not properly engaged by California.[1]

---

[1]Appellants' pleading before the Court is their third amended complaint. [C.T. 89-95.] In paragraph five, appellants alleged that, in 1963, defendants commenced construction of the San Gabriel River Freeway in the vicinity of appellants' homes and that, on or about September 20, 1965, said freeway was completed and is now in operation. (Judicial notice would decree that the work of appellee Kiewit had been completed and had been accepted by the State.) Before the California Court of Appeal, appellants claimed to have stated a cause of action on three distinct theories: (1) Inverse Condemnation; (2) Nuisance; and (3) Negligence. The Court of Appeal ruled that the pleading failed to state a cause of action in inverse condemnation [JS A-2 to A-5], failed to state a cause of action for nuisance [JS A-5 to A-6], and that, "The complaint purported to allege negligence on the part of Peter Kiewit Sons' Co. in the construction of the freeway. This claim is not pressed on the appeal; it is therefore unnecessary to consider additional arguments of this defendant in support of the judgment in its favor." [JS A-6.] The remedy of negligence, which is allowable against a contractor in California, was thus waived or abandoned by appellants; they do not here claim that the ruling of the Court of Appeal as to claimed negligence is before this Court; the ruling there made is a matter of state, not federal, concern, particularly as to whether appellants had rendered unnecessary consideration of appellee Kiewit's arguments because of appellants' failure to press the same (negligence) on their appeal before that court. While appellants do not claim here that they have a right based solely on nuisance against appellee Kiewit, no such action lies against the contractor under the circumstances presented. (See, e.g., *Katcher v. Home Sav. & Loan Assn.* (1966), 245 Cal.App.2d 425, 53 Cal.Rptr. 923.)

Certainly, no provision of the United States Constitution proscribes California from so engaging appellee as such contractor in construction of the freeway.

Appellants bottom their appeal to this Court on a claim that they have been disallowed an action for *inverse condemnation* on the basis of California Civil Code, section 3482, enacted in 1872, and that this is in violation of the United States Constitution. The noted state statute provides:

> "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

This statute does not prevent a plaintiff, in a proper case, from seeking compensation through inverse condemnation proceedings pursuant to the self-executing provisions of the California Constitution. It concerns solely suits for damages for alleged nuisance—nothing more and nothing less. It does not preclude other remedies. By their own statements above quoted, appellants' claim before this court is in regard to their alleged action or right in inverse condemnation. Assuming that section 3482 is part and parcel of their claimed inverse condemnation action, as is implicit in their contention to this Court, the narrow question presented as it relates to appellee Kiewit is whether appellants have any such inverse condemnation rights against the contractor. No action or right in inverse condemnation exists against the contractor, here appellee Kiewit, under either Federal or State law and no such action is required to be allowed against the contractor under the United States Constitution.

ARGUMENT.

I.

Appellee Kiewit, the Contractor, Is Not Liable to Appellants for Inverse Condemnation.

As heretofore seen, appellants' claim before this Court is that they are entitled to redress in inverse condemnation—it being their claim that rights have been taken from them for public use without just compensation. If such be true, their remedy is in inverse condemnation against the governmental body. That remedy does not lie against the contractor.

In *Yearsley v. W. A. Ross Construction Co.* (1940), 309 U.S. 18, 84 L.ed. 554, 60 S.Ct. 413, the petitioners "alleged that the contract did not contemplate the taking of their land without just compensation and that the acts of the contractor resulted in the destruction of petitioners' property in violation of their rights under the Fifth Amendment of the Federal Constitution." The work was performed by the contractor under a contract with the United States Government. The trial court gave judgment for the petitioners which was reversed by the Circuit Court of Appeals. In affirming, the judgment of the appellate court, this Court held (309 U.S. at pp. 20-21):

> "In that view, it is clear that if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will. See Den ex dem. Murray v. Hoboken Land & Improv. Co., 18 How (US) 272, 283, 15 L ed 372, 377; Lamar v. Browne, 92 US 187, 199, 23 L ed 650 655; The Habana, 189 US 453, 465, 47 L ed 901, 903, 23 S Ct. 593. . . ."

It was pointed out (309 U.S. at p. 21) that, if there was a taking for which compensation was to be made under the Fifth Amendment of the Constitution, the remedy was against the Government, and, on pages 21-22, that, "It follows that as the Government in such a case promises just compensation and provides a complete remedy, action which constitutes the taking of property is within its constitutional power and there is no ground for holding its agent liable who is simply acting under the authority thus validly conferred. The action of the agent is 'the act of the government.' United States v. Lynah, 188 US 445, 47 L ed 539, 23 S Ct 349, supra."

The California courts are in accord.

The California law is well summarized in *Asher v. Pacific Power and Light Co.* (1965), 249 F.Supp. 671, 676-677, where it was said:

> "The first cause of action is based on inverse condemnation and charges the 'defendants' with liability. An inverse condemnation action in California is based on article 1, section 14 of the California Constitution which provides that private property shall not be taken or damaged for public use without just compensation. Frustruck v. City of Fairfax, 212 Cal.App.2d 345, 28 Cal.Rptr. 357 (1963). Furthermore, the party to be held liable under this constitutional provision is the public agency authorizing the work which is the cause of the damage. Heimann v. City of Los Angeles, 30 Cal.2d 746, 185 P.2d 597 (1947). The liability which forms the basis for this cause of action is not grounded upon negligence but upon the above mentioned constitutional provision. Hume v. Fres-

no Irr. Dist., 21 Cal.App.2d 348, 69 P.2d 483 (1937). Thus the officers, agents and contractors of the public agency are not liable under this cause of action. Heimann v. City of Los Angeles, supra, Hume v. Fresno Irr. Dist., supra."

In *Anderson v. Fay Improvement Co.* (1955), 134 Cal.App.2d 738, 745-746, 286 P.2d 513, 518-519, it pertinently was said:

"The law is well settled that the contractors or subdividors could not be held liable for the damage in a direct or inverse condemnation suit. . . The reason for the rule is obvious. In case of damages in an inverse condemnation proceeding it is the public that has devoted the property to the public use, and the public and not the private contractor should pay for the damage. The damage to the right of access was, in effect, a taking by the government for a public use. . . The wrongful act entitling the plaintiffs to compensation was that of the city and county."

Appellee Kiewit does not mean to suggest that appellants here have stated any right in inverse condemnation against the State of California. In a proper case, appellants undoubtedly would have an action in inverse condemnation against the governmental body which has taken property for public use without compensation. California has provided such a remedy through the self-executing provisions of its Constitution. *Rose v. State of California* (1942), 19 Cal.2d 713, 123 P.2d 505. But no such action in inverse condemnation exists against the contractor engaged by the governmental body to perform the work of construction of the free-

way. The Constitution of the United States does not require that an action in inverse condemnation exist or be had as against the contractor. *Yearsley v. W. A. Ross Construction Co.; supra,* 309 U.S. 18. Insofar as concerns appellee Kiewit, no federal right has been shown to have been violated in regard to appellants.

As to appellee Kiewit, therefore, appellants' appeal should be dismissed or the judgment affirmed for the aforestated reasons.

II.

Appellants Failed to Docket Their Case in This Court Within the Time Prescribed by the Revised Rules of This Court.

Rule 24 of the California Rules of Court provides, insofar as here material:

> ". . . A decision of a Court of Appeal becomes final as to that court 30 days after filing, . . . When a decision of a Court of Appeal is final as to said court, it is not subject to modification or rehearing by said court. . ."

Rule 27 of the California Rules of Court provides, insofar as here material:

> ". . . [A] Court of Appeal may grant a rehearing after its own decision in any cause . . . A rehearing may be granted on petition, . . . or on the court's own motion, prior to but not after the time the decision becomes final therein.
>
> ". . . A party seeking a rehearing . . . in the Court of Appeal . . . must serve and file a petition therefor within 15 days after the filing of the decision.

". . . If no order is made before the decision becomes final as provided in . . . Rule 24, the petition shall be denied, and the clerk shall enter a notation in the register to that effect."

Rule 28 of the California Rules of Court provides, insofar as here material:

"Within 30 days after a decision of a Court of Appeal becomes final as to that court, the Supreme Court, on its own motion, or on petition . . ., may order the cause transferred to itself for hearing and decision, . . . A party seeking a hearing must serve and file a petition therefor within 10 days after the decision of the Court of Appeal becomes final as to that court, . . . The denial of a hearing may be evidenced by an order signed by the Chief Justice and filed with the clerk. . ."

On page 2 of appellants' Jurisdictional Statement, it is said:

"The judgment sought to be reviewed is that of the California Court of Appeal. Said judgment was filed and entered on October 17, 1968. A timely Petition for Rehearing was duly filed on November 1, 1968, and was denied by the Court of Appeal on November 13, 1968. A timely Petition for Hearing was duly filed in the Supreme Court of California on November 22, 1968, and was denied on December 11, 1968. A Notice of Appeal to the Supreme Court of the United States was filed in the California Court of Appeal, Second Appellate District, on January 15, 1969."

Under the foregoing, the judgment of the Court of Appeal was not subject to modification or rehearing

by that court after the lapse of 30 days from October 17, 1968; it was final as to that Court. While the cause was subject to being transferred to the California Supreme Court during the following 30 days, the latter Court on December 11, 1968, denied appellants' petition for hearing. The time for appellate proceedings to this Court began to run as of the date of such denial, December 11, 1968. *Department of Banking v. Pink* (1942), 317 U.S. 264, 87 L.ed 254, 63 S.Ct. 233; *Monks v. Lee* (1942), 317 U.S. 590, 87 L.ed 483, 63 S.Ct. 50; *Market Street R. Co. v. Railroad Com. of Cal.* (1945), 324 U.S. 548, 89 L.ed 1171, 65 S.Ct. 770.

While appellants' notice of appeal to this Court was filed within ninety days of December 11, 1968, they did not docket their cause with this Court within said ninety-day period. So far as appellee Kiewit is aware, appellants did not seek or secure any extension from any Justice of this Court within which to docket the case. No such application was ever served upon counsel for appellee Kiewit.

Rule 13 of the Revised Rules of this Court, so far as here material, provides:

> "Not more than ninety days after the entry of the judgment appealed from it shall be the duty of the appellant to docket the case . . . For good cause shown, a justice of this court may extend the time for docketing a case for a period not exceeding sixty days. Where application under this rule is made, paragraph 2 of Rule 34 governs timeliness. Such applications are not favored."

Rule 34, paragraph 2, Revised Rules of this Court, provides in this regard: "Applications for extension of

time . . . to docket appeals shall be submitted at least ten days before the expiration of the period sought to be extended and will not be granted except in the most extraordinary circumstances if filed during the last ten days of such period." (Paragraph 3 thereof requires that such an application "must be presented and served upon all parties as provided in Rule 50, . . .")

Appellants failed to docket their appeal within the ninety-day period from December 11, 1968, the date upon which the California Supreme Court denied appellants' Petition for Hearing and the date upon which, therefore, the judgment of the California Court of Appeal, theretofore rendered and entered, became final for appellate proceedings to this Court under the cited authorities.

Appellee Kiewit recognizes that probably a failure to docket within ninety days is not jurisdictional. *Johnson v. Florida* (1968), 391 U.S. 596, 20 L.ed 2d 838, 88 S.Ct. 1713. Nevertheless, the unexcused failure would appear to constitute a basis for dismissal of the appeal. *Pittsburgh Towing Co. v. Mississippi Barge Line* (1966), 385 U.S. 32, 17 L.ed. 2d 31, 87 S.Ct. 195. In accordance with letter dated March 19, 1969, from the Clerk of this Court (Xerox copy of which has been forwarded by counsel for Kiewit to counsel for appellants and to counsel for the State of California), appellee Kiewit has incorporated in this motion the untimeliness of the docketing. Appellee Kiewit submits that this Court should enforce the requirements of its Rules regulating the docketing of appeals to this Court. As held in *Pittsburgh Towing Co., supra,* 385 U.S. at page 32: "This Court has been generous in excusing errors of counsel, but if there are to be rules, there

must be some limit to our willingness to overlook their violation."

Appellants had ample time to have docketed their appeal within the prescribed period. They did not do so. If it was necessary to have additional time, they could have applied therefor. They did not do so. Unless the Rules of this Court be enforced, the same become meaningless and ineffective—promotive of dilatory practices—contrary to the express provisions and intent of the Rules.

Appellants' failure to docket their appeal within the prescribed time is submitted to constitute an additional, albeit less conclusive, reason for dismissal to the reasons expressed in Point I of this motion.

Conclusion.

For the foregoing reasons and each of them, it is respectfully submitted and prayed that, as to Appellee, Peter Kiewit Sons' Co., a corporation, the appeal be dismissed or the judgment be affirmed.

Dated: March 26, 1969.

HENRY F. WALKER,
WAYNE VEATCH,
ROBERT C. CARLSON,
ROBERT P. DORSEY,
and
FREDERICK C. QUIMBY, JR.,
Counsel for Appellee, Peter Kiewit Sons' Co., a corporation.

LIBRARY
SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
APR 3 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE

UNITED STATES.

October Term 1968

No. 1168

FRANK A. LOMBARDY, et al.,
Appellants,
vs.
PETER KIEWIT SONS' CO.,
a corporation, and PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,
Appellees.

APPELLANTS' REPLY BRIEF TO MOTION TO DISMISS OR AFFIRM OF APPELLEE PETER KIEWIT SONS' CO.

HYMAN GOLDMAN,
JERROLD A. FADEM,
GIDEON KANNER,
6505 Wilshire Boulevard
Los Angeles, Calif. 90048
651-3372

Attorneys for Appellants

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1968

No. 1168

FRANK A. LOMBARDY, et al.,

Appellants,

vs.

PETER KIEWIT SONS' CO.,
a corporation, and PEOPLE OF THE
STATE OF CALIFORNIA, acting by and
through the Department of Public Works,

Appellees.

APPELLANTS' REPLY BRIEF TO MOTION TO DISMISS OR AFFIRM OF APPELLEE PETER KIEWIT SONS' CO.

HYMAN GOLDMAN,
JERROLD A. FADEM,
GIDEON KANNER,
6505 Wilshire Boulevard
Los Angeles, Calif. 90048
651-3372

Attorneys for Appellants

TOPICAL INDEX

	Page
Table of Authorities	ii
KIEWIT'S SUBSTANTIVE ARGUMENTS ARE UNSOUND. GOVERNMENT CONTRACTORS LACK IMMUNITY	1
KIEWIT'S ARGUMENTS RE SUPPOSEDLY ADEQUATE STATE GROUNDS FOR THE DECISION BELOW ARE WITHOUT MERIT	4
THIS APPEAL SHOULD NOT BE DISMISSED FOR TARDINESS OF DOCKETING, IF ANY	6
CONCLUSION	9

TABLE OF AUTHORITIES

Cases	Page
Gorham v. Washington University (1942) 316 U.S. 98	6
Johnson v. Florida (1968) 391 U.S. 596	7
Mercantile Nat. Bank v. Langdeau (1963) 371 U.S. 555	7
Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co. (1966) 385 U.S. 32	8
Republic National Gas Co. v. Oklahoma (1948) 334 U.S. 62	6, 7
Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 56 Cal. Rptr. 128	3, 4
James Stewart & Co. v. Sadrakula (1940) 309 U.S. 94	2
United Public Workers v. Mitchell (1947) 330 U.S. 75	7
Yearsley v. W. A. Ross Construction Co. (1940) 309 U.S. 18	2, 3, 4

Rules	
California Rules of Court: Rule 24(a)	6

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1968

No. 1168

FRANK A. LOMBARDY, et al.,

Appellants,

vs.

PETER KIEWIT SONS' CO., a corporation, and PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellees.

APPELLANTS' REPLY BRIEF TO MOTION TO DISMISS OR AFFIRM OF APPELLEE PETER KIEWIT SONS' CO.

KIEWIT'S SUBSTANTIVE ARGUMENTS ARE UNSOUND. GOVERNMENT CONTRACTORS LACK IMMUNITY

In its motion, Peter Kiewit Sons' Co. (hereafter Kiewit) does not attack the

substantiality of the federal question, but rather bottoms the principal thrust of its motion on an argument supposedly going to the merits.

Kiewit's arguments are legally unsound on the basis of this Court's decisions as well as most recent California law. In James Stewart & Co. v. Sadrakula (1940) 309 U.S. 94, 105, this Court rejected the notion that a government contractor can be immune from liability. The case so heavily relied on Kiewit, Yearsley v. W. A. Ross Construction Co. (1940) 309 U.S. 18 is consistent with the position of Appellants (hereafter referred to as Homeowners). The teaching of Yearsley is that a contractor may escape liability where " . . . the Government in such a case promises just compensation and provides a complete remedy . . ." 309 U.S. at 21-22. Yearsley speaks to the distribution of the burdens of paying just compensation 1/. Yearsley is not a device for unfairly depriving innocent people of compensation for damages suffered by them. The same is true of the California cases cited by Kiewit.

. . Yearsley, moreover, gives rise to another point which - we submit - cuts the ground out from under Kiewit's arguments. The rule of Yearsley is that the contractor can shift the burden of compensating damaged owners to the government, only where it has performed its

---

1/ Compare Jurisdictional Statement, pp. 17-20.

work as "authorized and directed" by the government. See 309 U.S. at 20-21. In the case at bench the Homeowners were not permitted to try the matter on the merits. 2/ There is therefore nothing before the Court (or the Courts below) upon which to bottom a conclusion that Kiewit acted as "authorized and directed".

In other words, Kiewit seeks to twist the eminently sensible rationale of Yearsley (i.e. that either the government or the contractor must compensate persons damaged by the construction) into a transparently erroneous assertion that a government contractor need only hold up its contract like a magic amulet, and thereby at once ward off any inquiry by the courts into the merits of the controversy.

Nor can Kiewit escape liability without inquiry into the merits, under state law. The most recent California decision on point, Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 56 Cal. Rptr. 128, comprehensively and thoughtfully analyzes the field of government contractors' liability, and concludes that such liability cannot be escaped by virtue of a government contract. See 247 Cal. App. 2d at 791-792, 56 Cal. Rptr. at 141-42. It is noteworthy that Smith reasons as did this Court in

---

2/ The Court will recall that this is an appeal from a judgment of dismissal following the sustaining of a demurrer without leave to amend Homeowners' complaint.

Yearsley, i. e. in considering the liability of a government contractor for damage to property, the judicial inquiry is directed to distribution of the burden as between the government and the contractor (see 247 Cal. App. 2d at 792, 56 Cal. Rptr. at 142). The policy rationale of the Smith decision (based on analysis of many cases from various jurisdictions) bears repeating here:

> " ' . . . Extension of the Government's immunity to independent contractors would run counter to recent trends and expressions which emphasize the need for restricting the immunity and the rightness of affording relief to those who suffer special damage without regard to whether the activity which caused the damage was governmental or private [numerous citations]. ' " Smith, supra, 247 Cal. App. 2d at 789-90, 56 Cal. Rptr. at 140.

Lawyers' jargon aside, the rule is simply stated: the courts have opted for fairness, not for oppression of those who are least able to bear it.

KIEWIT'S ARGUMENTS RE SUPPOSEDLY ADEQUATE STATE GROUNDS FOR THE DECISION BELOW ARE WITHOUT MERIT

A reading of the opinion of the California

Court of Appeal herein, appended to the Jurisdictional Statement, will satisfy the Court that the decision was not based on any "adequate non-federal basis" of a contractor's non-liability, Kiewit's assertions notwithstanding.

Indeed, it is fair to say that this entire line of argument by Kiewit appears to be made in something less than good faith. Kiewit has heretofore taken the contrary position. Kiewit has argued below that (a) the California Court of Appeal properly decided the case - as to Kiewit - on the basis of inverse condemnation and nuisance, and (b) the determination of Kiewit's non-liability because of its status as contractor was "[u]nnecessary for consideration by the Court of Appeal . . . ." 3/

It is difficult to understand how a principle not decided by the courts below and concededly not necessary for decision, can somehow become an "adequate non-federal basis" for the decision below.

3/ Kiewit so asserted in its brief filed in the California Supreme Court: "Respondent Kiewit's Answer to Petition for Hearing", p. 4.

THIS APPEAL SHOULD NOT BE DISMISSED FOR TARDINESS OF DOCKETING, IF ANY

Appellants submit that:

(1) It is undisputed that the Notice of Appeal was timely filed and there are no jurisdictional objections to the docketing.

(2) It is at most doubtful whether the docketing is tardy.

(3) The tardiness, if any, is de minimis.

(4) The tardiness, if any, was contributed to by a failure of air express to deliver Appellants' papers to this Court as instructed.

Kiewit's arguments are bottomed on the assumption that the judgment appealed from became final on December 11, 1968. Appellants submit that it did not. Under Rule 24(a) California Rules of Court, a decision of the California Supreme Court theoretically does not become final for 30 days after it is filed. Cf. Gorman v. Washington University (1942) 316 U.S. 98, 100-101.

Appellants are aware that this Court makes its own pragmatic determination of finality in the light of real interests of all concerned. Republic National Gas Co. v. Oklahoma (1948)

334 U.S. 62, 69. It is, therefore, submitted that pragmatically speaking, the decision below was not final until December 19, 1969, when the California Court of Appeal remittitur was entered (thereby California appellate courts lost jurisdiction). Thus, computing time from December 19, 1969, the docketing is timely.

Mr. Justice Frankfurter observed in Republic National Gas, supra, that the line circumscribing finality is "faint and faltering at times" (334 U.S. at 69). Appellants should not be punished for misreading (if misread they did) so imprecise a legal directive.

The policy of this Court has been to impose more rigorous requirements of timeliness only in cases of possible prematurity of constitutional review (Republic National Gas, supra, 334 U.S. at 71), because the right to review is then preserved until finality occurs. 4/ But in cases where tardiness of docketing is asserted in an effort to deprive an appellant of adjudication on the merits altogether, the Court has invoked an enlightened rule of treating tardy docketing as not affecting review on the merits. Johnson v. Florida (1968) 391 U.S. 596; United Public Workers v. Mitchell (1947) 330 U.S. 75, 86.

4/ But note that even that policy has been liberalized in favor of review on the merits, in more recent cases; see Mercantile Nat. Bank v. Langdeau (1963) 371 U.S. 555, 557-58.

In the case at bench particularly, the tardiness, if any, is minimal. Under Kiewit's time computation, the appeal should have been docketed on March 11, 1969. It was docketed on March 18, 1969, only seven days "late". Surely this is de minimis by any standard.

Moreover, even that modest period of time was contributed to by factors beyond Appellants' control. The documents necessary for docketing were delivered by Appellants' printers to Airborne Freight Corporation, an air express company, on March 14, 1969, with strict instructions to deliver them to the office of the Clerk of the United States Supreme Court on the next business day by special delivery service which Airborne Freight Corporation maintains to Washington, D. C. In disregard of instructions, Airborne Freight Corporation did not deliver the documents to the Clerk's office until March 18, 1969, on which date the appeal was docketed.

On these facts [5/] it is submitted that

5/ In light of the Court's language in Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co. (1966) 385 U.S. 32, Appellants respectfully suggest that they offered no comment in the Jurisdictional Statement as to supposed reasons for the tardiness of docketing of their appeal, because (a) they were (and still are) proceeding in the belief that they were not tardy, and (b) they manifestly could not anticipate that Airborne Freight Corp. would disregard instructions and fail to deliver Appellants' papers as instructed.

Kiewit's arguments relative to timeliness of docketing should be rejected.

CONCLUSION

The essence of Kiewit's motion is a desire to escape, not only liability, but even any inquiry as to whether liability exists under the facts. Appellants submit that they should be permitted to have their day in court on the merits. If Kiewit did its work as "authorized and directed" by the state, it has nothing to fear from such an inquiry. If it did not, it should compensate Appellants for the damage inflicted upon them. Basic fairness requires no less.

Kiewit's arguments, objectively read, emphasize that what Kiewit wants is to have this Court close its eyes to wholesale injustice. Kiewit's arguments are the stuff which inevitably destroys a people's faith in their system.

Appellants, therefore, pray that Kiewit's motion be denied, and probable jurisdiction noted.

Respectfully submitted,

HYMAN GOLDMAN,
JERROLD A. FADEM,
GIDEON KANNER

Attorneys for Appellants.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 7 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968
No. 1168

FRANK A. LOMBARDY, *et al.*,

Appellants,

vs.

PETER KIEWIT SONS' CO., a corporation, and PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellees.

On Appeal From the Court of Appeal of the State of California, Second Appellate District, Division Three.

Motion of Appellee People of the State of California to Dismiss Appeal and Brief in Support Thereof.

JACK M. MILLER,
JOSEPH A. MONTOYA,
RICHARD L. FRANCK,
and
ROBERT L. MEYER,
107 South Broadway,
Suite 9111,
Los Angeles, Calif. 90012,

Counsel for Appellee People of the State of California.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

SUBJECT INDEX

Page

I.

Supplemental Statement of Proceedings Below 2

II.

The Judgment Below Rests on Sound Bases Consonant With Prior Decisions of This Court 4

III.

The Judgment Below Rests on an Adequate Non-Federal Basis 8

IV.

The Cases Involving Trespass of Air Space Do Not Sustain Jurisdiction of the Case at Bar 9

V.

Appellants Failed to Docket Their Case in This Court Within the Time Prescribed by the Rules of This Court 10

VI.

Conclusion 10

TABLE OF AUTHORITIES CITED

Cases	Page
Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U.S. 317	4, 6
Bartholomae Corp. v. U.S., 253 F. 2d 716	8
Batten v. U.S., 306 F. 2d 580, cert. den. 371 U.S. 955, Reh. den. 372 U.S. 925	7
Bellamy v. U.S., 235 F. Supp. 139	8
Griggs v. County of Allegheny, 369 U.S. 84	9
Nunnally v. U.S., 239 F. 2d 521	8
Portsmouth Harbor etc. Co. v. U.S., 260 U.S. 327	9
Richards v. Washington Terminal Co., 233 U.S. 546	4, 6
United States v. Causby, 328 U.S. 256	9
U.S. ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266	8
Rules	
California Rules of Court, Rule 24	10
California Rules of Court, Rule 27	10
California Rules of Court, Rule 28	10
Rules of the Supreme Court of the United States, Rule 13	1
Rules of the Supreme Court of the United States, Rule 16(1)(b)	1
Statutes	
California Civil Code, Sec. 3482	7
California Constitution, Art. IV, Sec. 36	4
California Government Code, Sec. 14000	4
California Government Code, Sec. 14001	4
California Streets and Highways Code, Sec. 90	4
United States Constitution, Fifth Amendment	8

IN THE

Supreme Court of the United States

October Term, 1968
No. 1168

FRANK A. LOMBARDY, *et al.*,

Appellants,

vs.

PETER KIEWIT SONS, Co., a corporation, and PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellees.

On Appeal From the Court of Appeal of the State of California, Second Appellate District, Division Three.

Motion of Appellee People of the State of California to Dismiss Appeal and Brief in Support Thereof.

The People of the State of California, acting by and through the Department of Public Works, hereinafter called the "State", hereby move this Honorable Court to dismiss the appeal herein. This motion is made pursuant to Rule 16(1)(b), Rules of the Supreme Court of the United States, on the grounds that no substantial federal question is presented by appellants and that the judgment of the court below rests on an adequate non-federal basis.

I.

Supplemental Statement of Proceedings Below.

The trial court sustained this Appellee's demurrer to appellants' Third Amended Complaint on the ground that it failed to state facts sufficient to constitute a cause of action against the State [Minute Order of October 24, 1966, Clerk's Transcript, p. 123], and entered Judgment of Dismissal [C. T. p. 124]. The said Minute Order sets forth the grounds therefor, incorporating by reference its Minute Order of August 22, 1966 [C. T. p. 88] which sustained this Appellee's demurrer to appellants' Second Amended Complaint, and also incorporating by reference this Appellee's points and authorities as set forth in Clerk's Transcript, pages 109 through 111. The gist of said grounds, quoting from Clerk's Transcript, page 88, follows:

> "Specifically, the complaint does not state a cause of action:
>
> 1. In Inverse condemnation (trespass); People vs Presley (1966) 239 ACA 328; People vs Symons (1960) 54 C 2nd 855; Friesen vs City of Glendale (1930) 209 Cal 524 (tract restrictions).
>
> 2. For a *public nuisance,* because it fails to allege facts showing that the alleged nuisance is 'specially injurious' to plaintiff. In view of the fact that the complaint lists eighteen plaintiffs, it appears on the face of the complaint that the alleged nuisance 'affects any considerable number of persons', and

therefore is a public nuisance. Civil Code section 3480. In order to state a cause of action for a public nuisance, plaintiff must allege facts showing that it is 'specially injurious to' themselves, as opposed to the public generally. Civil Code section 3493; Ward vs Oakley (1954) 125 CA 2nd 840; Wallace vs MacDonough Theater Co. (1917) 34 CA 498.

3. For a private nuisance. In order to state a cause of action based on a private nuisance, the alleged facts must show an injury or invasion of private right or interest of plaintiffs, Civil Code sections 3480, 3481; 36 Cal Jur 2nd 490; Reinhard vs Laurence Warehouse Company (1940) 41 CA 2nd 741, 745. The facts alleged do not show any right to be free from damage or injury caused by fumes, noise, dust, shocks and vibrations, traffic, or impairment of view, and arising from the construction or operation of a freeway in the vicinity of plaintiffs' homes by defendant State of California; People vs Presley (1966) 239 ACA 328 (not a 'property interest'); People vs Symons (1960) 54 Cal 2nd 855."

The California Court of Appeal sustained the judgment of the trial court, specifying the several grounds therefor beginning at page 656 of 266 Advance California Appellate (See Appellants' Juris. State. Appendix, p. A-3, Headnote [1], *et seq.*) Said grounds were substantially the same as those of the trial court.

II.

The Judgment Below Rests on Sound Bases Consonant With Prior Decisions of This Court.

The foregoing supplemental statement specifies the grounds for the holdings of the courts below. The California Supreme Court, by denying a hearing, impliedly concurred. The pertinent portions of the pleadings are quoted in the California Court of Appeal decision at pages 655 and 656 of 266 Advance California Appellate (See Appellants' Juris. State. Appendix pp. A-2 and A-3). Said pleadings alleged facts which expressly negate the existence of a private nuisance and allege, if anything, what might amount to a public nuisance if not authorized by legislation. The reasoning of the appellate court below, beginning at Headnote [5a] on page 658 of 266 A.C.A. (See Appellants' Juris. State Appendix, p. A-5) and continuing through Headnotes [6] and [5a] clearly points this out and shows express statutory authorization for this freeway construction and operation (Art. IV, Sec. 36, Calif. Constitution, Calif. Gov't Code, §§ 14000 and 14001, and Calif. Streets & Highways Code, §§ 90 *et seq.*).

Said holding by the appellate court below is entirely consistent with the two U.S. Supreme Court decisions cited by appellants in their Jurisdictional Statement herein containing analogous facts and legal principles, to wit: *Richards v. Washington Terminal Co.* (1913), 233 U.S. 546; *Baltimore & P. R. Co. v. Fifth Baptist Church* (1883), 108 U.S. 317.

In the *Richards* case,[1] this court held that there was

[1]In *Richards v. Washington Terminal Co., supra,* plaintiff's complaint alleged that smoke, cinders and gases damaged furniture and other personal property, that vibrations cracked walls and

no "taking," within the constitutional provision, for such damages

> ". . . as naturally and unavoidably result from the proper conduct of the road and are shared generally by property owners whose lands lie within range of the inconveniences necessarily incident to proximity to a railroad. [This] includes the noises and

---

wallpaper, broke windows and disturbed the peace and slumber of the occupants. In limiting recovery to just such damages as was caused by the smoke and gases directed on said property from a tunnel exhaust system, the court said, at page 551 of 233 U.S.:

> ". . . [W]ith respect to most of the elements of damage to which the plaintiff's property has been subjected, the courts below correctly held them to be *damnum absque injuria*; but that with respect to such damage as is attributed to the gases and smoke emitted from locomotive engines while in the tunnel, and forced out of it by means of a fanning system through a portal located so near plaintiff's property that these gases and smoke materially contribute to injure the furniture and render the house less habitable than otherwise it would be, there is a right of recovery."

Continuing, at page 553 of 233 U.S.:

> "We deem the true rule, under the 5th Amendment, as under state constitutions containing a similar prohibition, to be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use. (Citations.)."

The Court then goes on, at page 554 of 233 U.S. to define what *does* and what *does not* amount to such a "taking" of property, saying that railroads are not subject to actions by adjacent owners for ordinary damages attributable to the operation of the railroad, in the absence of negligence, that:

> "Such roads are treated as public highways, and the proprietors as public servants, with the exemption normally enjoyed by such servants from liability to private suit, so far as concerns the incidental damages accruing to owners of non-adjacent land through the proper and skilful management and operation of the railways. Any diminution of the value of the property not directly invaded nor peculiarly affected, but sharing in the common burden of incidental damages arising from the legalized nuisance, is held not to be a 'taking' within the constitutional sense."

vibrations incident to the running of trains, the necessary emission of smoke and sparks from the locomotives, and similar annoyances inseparable from the normal and non-negligent operation of a railroad." (233 U.S. at p. 554)

In *Baltimore & P. R. Co. v. Fifth Baptist Church, supra,* this court recognized the same legal principles, saying at page 331 of 108 U.S.:

> "Undoubtedly, a railway over the public highways of the District, including the streets of the City of Washington, may be authorized by Congress, and if when used with reasonable care it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyances may necessarily follow from the running of the cars on the road with reasonable care is *damnum absque injuria.* The private inconvenience must be suffered for the public accommodation."[2]

The foregoing quotation applies fully to the case at bar, if "freeway" were substituted for "railroad". The lan-

---

[2]The court goes on to say, at page 332 of 108 U.S.:

> "The acts that a Legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public has control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."

The matter just quoted is in accord with the holding in the *Richards v. Washington Terminal Co.* case, cited *supra,* and with the holding of the California Court of Appeal in the case at bar.

guage is synonymous with that of the appellate court below in the case at bar.

The foregoing quotations from prior decisions of this court show complete accord with the holdings of the lower courts in the case at bar, to wit, that noise, dust, fumes, and vibrations from normal operations of a railroad or a public highway (including freeways) do not constitute "takings" for which the U.S. Constitution requires the payment of compensation. Instead, they constitute factors which the public interest requires the individual to accept as a necessary adjunct to modern civilization, suffered in varying degrees along with the general public.

Section 3482 of the California Civil Code merely codifies the well-settled and long-followed rule enunciated in said prior decisions of this court. As applied to the pleadings in the case at bar, said statute denies a right to compensation in connection with those activities which this court has judicially declared *damnum absque injuria.* Appellants herein did not plead any special or peculiar damage to their property such as a tunnel exhaust system directed toward their properties or a railroad-like repair shop operation conducted adjacent to their properties. The type of damage pleaded was that which the general public suffers in varying degree, as was so succinctly pointed out by the appellate court below (See Appellants' Juris. State. Appendix at pp. A-5 and A-6).

Therefore, this Appellee submits that the courts below followed well-settled law enunciated in U.S. Supreme Court decisions, U.S. Court of Appeal decisions, and prior California court decisions. See *Batten v. U.S.*, 306 F. 2d 580 (CCA 10, 1962) cert. den. 371 U.S. 955, Reh. den. 372 U.S. 925, denying recovery for noise,

vibration and smoke from nearby jet base; to the same effect, see *Bellamy v. U.S.*, 235 F. Supp. 139 (E.D.S.C. 1964). See also *Nunnally v. U.S.*, 239 F. 2d 521 (CCA 4) denying recovery where noise and vibrations from practice bombing on adjoining federal land damaged recreational cottage; and see *Bartholomae Corp. v. U.S.*, 253 F. 2d 716 (CCA 9) where nuclear detonations on other lands damaged property.

III.

The Judgment Below Rests on an Adequate Non-Federal Basis.

The judgment below rests on several grounds, as has been previously noted. Appellants failed to comply with basic pleading requirements and did not allege facts showing any substantial damage resulted from the activities of this respondent. Absence of such necessary allegations in four attempts implies that they did not exist. Failure to meet such basic pleading requirements of California Law does not raise a federal issue.

The courts below held that appellants have no "property right" to be free from mental, physical and emotional distress caused by fumes, noise, dust, shocks and vibrations incident to normal construction and operation of a freeway. This holding is in accord with this court's decisions as pointed out hereinabove. Apart from those decisions, *U.S. ex rel. Tennessee Valley Authority v. Powelson,* 319 U.S. 266, states at page 279 that while the meaning of "property" as used in the 5th Amendment is a federal question, "it will normally obtain its content by reference to local law". Therefore, the judgment below rests on an adequate non-federal basis.

IV.

The Cases Involving Trespass of Air Space Do Not Sustain Jurisdiction of the Case at Bar.

Portsmouth Harbor etc. Co. v. U.S. (1922), 260 U.S. 327, involved trespass of air space by firing projectiles from a shore battery directly over private property toward the ocean; *United States v. Causby* (1946), 328 U.S. 256, and *Griggs v. County of Allegheny* (1962), 369 U.S. 84, both involved trespass of air space by aircraft overflights in landing and takeoff. A review of these three cases cited by appellants in their Jurisdictional Statement fails to reveal any manner in which those cases are analogous to the case at bar so as to sustain the jurisdiction of this court. In these three cases, liability was based on the theory that the owner possessed a *property right* in the air space immediately above the surface of his property, that invasions of this air space by such physical objects as projectiles and aircraft on a continuing basis constituted the "taking" of an air easement.

In the case at bar there are no allegations of a *physical invasion of the air space* above appellants' properties, either by bridges or other structures, nor that the airspace or the land surface was used by vehicles entering or leaving the freeway. Therefore, the latter three cases provide no factual or legal basis to sustain the jurisdiction of this court to hear the case at bar.

V.

Appellants Failed to Docket Their Case in This Court Within the Time Prescribed by the Rules of This Court.

Rule 13, Rules for the Supreme Court of the United States, requires appellants to docket the case within ninety days after the entry of the judgment appealed from.

Under California Rules of Court, Rules 24, 27, and 28, the judgment below became final on December 11, 1968, when the California Supreme Court denied appellants' Petition For Hearing.

Appellants failed to docket their case within ninety days from December 11, 1968.

Therefore, this appellee submits this appeal should be dismissed for unexcused failure to docket within the time required under this Court's Rules.

VI.

Conclusion.

This appellee respectfully submits that, based upon the foregoing grounds, singularly and together, this appeal should be dismissed.

Dated April 4, 1969.

JACK M. MILLER,
JOSEPH A. MONTOYA,
RICHARD L. FRANCK,
and
ROBERT L. MEYER,
Counsel for Appellee People of the State of California.

LIBRARY
SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
APR 14 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1968

No. 1168

FRANK A. LOMBARDY, et al.,

Appellants,

vs.

PETER KIEWIT SONS' CO., a corporation, and PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellees.

APPELLANTS' REPLY BRIEF TO MOTION TO DISMISS OF APPELLEE PEOPLE OF THE STATE OF CALIFORNIA

HYMAN GOLDMAN
JERROLD A. FADEM
GIDEON KANNER
6505 Wilshire Boulevard
Los Angeles, Calif. 90048
651-3372

Attorneys for Appellants

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1968

No. 1168

FRANK A. LOMBARDY, et al.,

Appellants,

vs.

PETER KIEWIT SONS' CO., a corporation, and PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellees.

APPELLANTS' REPLY BRIEF TO MOTION TO DISMISS OF APPELLEE PEOPLE OF THE STATE OF CALIFORNIA

HYMAN GOLDMAN
JERROLD A. FADEM
GIDEON KANNER
6505 Wilshire Boulevard
Los Angeles, Calif. 90048
651-3372

Attorneys for Appellants

TOPICAL INDEX

	Page
Table of Authorities	ii
INTRODUCTION	1
THE STATE'S ARGUMENTS CONCEDE THE PRINCIPAL CONSTITUTIONAL CONTENTION OF HOMEOWNERS	3
THE STATE'S ARGUMENTS MISCONCEIVE THE NATURE OF THE "ADEQUATE NON-FEDERAL BASIS" DOCTRINE. THIS DOCTRINE MAY NOT BE USED TO COMPEL THE U. S. SUPREME COURT TO ACCEPT A STATE COURT REVIEW OF A PLEADING	8
CONCLUSION	11

TABLE OF AUTHORITIES

Cases	Page
American Ry. Express Co. v. Levee (1923) 263 U.S. 19	9
Brown v. Western Ry. Co. (1949) 338 U.S. 294	8
Covington & Lexington Turnpike Co. v. Sandford (1896) 164 U.S. 578	9
Davis v. Wechsler (1923) 263 U.S. 22	9
First Nat. Bank v. Anderson (1926) 269 U.S. 295	9
Green v. Palmer (1860) 15 Cal. 412	5
Peabody v. United States (1913) 231 U.S. 530	6
Portsmouth Harbor etc. Co. v. United States (1919) 250 U.S. 1	7
Portsmouth Harbor etc. Co. v. United States (1922) 260 U.S. 327	7
Richard v. Washington Terminal Co. (1914) 233 U.S. 546	5

Cases	Page
Rogers v. Alabama (1904) 192 U.S. 226	8-9
Seaboard Air Line R. Co. v. United States (1923) 261 U.S. 299	10
United States v. Certain Properties, etc. (1966, W.D. Mich.) 252 F. Supp. 319	5
United States v. Dickinson (1947) 331 U.S. 745	11

Constitution

United States Constitution:	
Fifth Amendment	3

Statute

California Civil Code:	
§3482	9-10

Text

Chadbourn et al., California Pleading, §866, pp. 811-12 (1961)	5

Miscellaneous — Page

Cohen, Location-Design and Control of Transportation Noise, Jour. of Urban Planning and Development Division, Proceedings of the American Soc. of Civil Engineers, Dec. 1967, p. 67, fig. 3 — 6

Federal Register. Vol. 33, No. 18[illegible], p. 14259 — 6

Noise Sound Without Value, Committee on Environmental Quality of the Federal Counell for Science and Technology, Sept. 1968, p. 16 — 6

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1968

No. 1168

FRANK A. LOMBARDY, et al.,

Appellants,

vs.

PETER KIEWIT SONS' CO., a corporation, and PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the Department of Public Works,

Appellees.

APPELLANTS' REPLY BRIEF TO MOTION TO DISMISS OF APPELLEE PEOPLE OF THE STATE OF CALIFORNIA

INTRODUCTION

The State's utter failure to direct any argument whatever to the importance and

substantiality of the federal question presented is an eloquent concession of the severity of the problem presented to the court, and its nationwide impact. Appellants cannot overemphasize the arguments they made at pp. 8-10 of the Jurisdictional Statement. These arguments stand unchallenged.

This is a nationwide as well as a federal problem brought before the Court. Admitted damage and injury is being wreaked on the Homeowners, while the State courts have refused to adjudicate the violation of Federal Constitutional rights, on the supposed authority of a state statute.

Accordingly, Appellants submit that the State's motion should be denied [1] and probable jurisdiction noted.

1/ Insofar as the State's motion is based on an asserted tardiness of docketing, Appellants invite the Court's attention to pp. 6-8, of Appellants' Reply Brief to Motion to Dismiss or Affirm of Appellee Peter Kiewit Sons' Co.

THE STATE'S ARGUMENTS CONCEDE THE PRINCIPAL CONSTITUTIONAL CONTENTION OF HOMEOWNERS

There is no dispute here whether a nuisance can be so noxious as to amount to a constitutional "taking". There is likewise no dispute that public transportation facilities can thus work a taking-by-nuisance of adjoining land. The State concedes these things, and only argues that there is no liability for interferences with adjoining property resulting " ... from normal operations of a railroad or a public highway." (State's Brief, p. 7.) 2/

But even that argument of the State is deficient. The law dealing with taking-by-nuisance caused by 19th Century railroad technology seems hardly capable of delineating the legal impact of 20th Century urban freeway technology whose Fifth Amendment ramifications have never been reviewed by this Court. Even in their heyday railroads did not criss-cross inhabited portions of cities every few miles (as they do in the Los Angeles basin). 3/

2/ Please note that the State's assertion that the Homeowners did not plead damage special to themselves is factually incorrect. See Record herein, Clerk's Transcript, p. 93, lines 29-32.

3/ Los Angeles freeways are being built so as to form a grid with freeways only 2-3 miles apart.

Even on a heavily-used railroad mainline, trains never ran incessantly, continuously, day and night, as does traffic on urban freeways. The issue before the Court can be rationally resolved only by a factual inquiry into the extent and severity of the nuisance constituting the "taking". Yet Homeowners were not permitted their day in court on the merits.

Moreover, the State's argument begs the questions it necessarily raises:

(1) What are "normal operations" of an urban freeway?

(2) Who is to say what these "normal operations" are? Can a defendant merely assert that operations are "normal" and thereby foreclose the courts from factual inquiry as to the supposed "normalcy"?

(3) What are the factual standards by which "normalcy" is to be judged?

These questions cannot be answered without any inquiry into the facts, on the merits.

The State ignores the procedural posture of this case: This is an appeal from a dismissal based on the sustaining of a demurrer. The Homeowners were never permitted to offer any evidence; nor was evidence offered by any

other party. 4/ Upon what basis, then, can the State assert to this Court that the highway construction and operations in Santa Fe Springs are "normal"? There is simply nothing in the record upon which one can decide if the operations as to the homeowners were "normal". Compare United States v. Certain Properties, etc. (1966, W.D. Mich.) 252 F. Supp. 319, where the trial court in the exercise of commendable judicial fairness and pragmatism held that the inquiry as to whether a highway-generated nuisance amounted to a "taking" could not be decided on the pleadings, nor on affidavits, but had to be determined as a question of fact on the merits.

The long and the short of the matter is that on the supposed basis of this Court's comments on liability for "normal" operations of 19th Century railroad technology, 5/ the State

---

4/ Please bear in mind that in California the pleading of evidentiary facts is not permitted. Green v. Palmer (1860) 15 Cal. 412, 414; Chadbourn et al., "California Pleading", §866, pp. 811-12 (1961). Thus, Homeowners were deprived of any opportunity to even state in evidentiary detail the nature of the "taking" complained of.

5/ And, of course, it must be emphasized that those comments of the Court were based on hard evidence developed in a jury trial. See Richard v. Washington Terminal Co. (1914) 233 U.S. 546, 548.

wants to foreclose any factual inquiry into the impact on the environment of 20th Century urban freeways.

The State's argument lacks merit. The most recent governmental studies indicate that because of its "round-the-clock, continuous" nature, noise from urban freeways is more disturbing even than aircraft noise. See Noise Sound Without Value, Committee on Environmental Quality of the Federal Council for Science and Technology, Sept. 1968, p. 16. The noise level to which dwellings within 100 feet of a freeway are continuously exposed, is as high or higher than the maximum permissible level of noise for places of employment under the U. S. Department of Labor Safety and Health Standards. 6/

Whether governmental interference with land amounts to a "taking" often depends on the intensity of the interference. This principle is well settled by decisions of this Court.

(1) In Peabody v. United States (1913) 231 U.S. 530, 540, the Court held that very rare firings of naval guns

---

6/ See Cohen, "Location-Design and Control of Transportation Noise", Jour. of Urban Planning and Development Division, Proceedings of the American Soc. of Civil Engineers, Dec. 1967, p. 67, fig. 3. And compare Federal Register, Vol. 33, No. 184, p. 14259.

near the affected land did not constitute a "taking".

(2) In Portsmouth Harbor etc. Co. v. United States (1919) 250 U.S. 1, 2, involving the same land and the same guns, the Court held that a slight increase in the firing frequency did not raise the interference to the level of a "taking".

(3) But, in Portsmouth Harbor etc. Co. v. United States (1922) 260 U.S. 327, again involving the same land and the same guns, the Court held that allegations of new and additional naval gunnery activity gave rise to a right to trial on the merits, which could not be denied upon a demurrer. In the words of Mr. Justice Holmes: "The present case was decided upon demurrer. The question, therefore, is not what inferences should be drawn from the facts that may be proved, but whether the allegations, if proved, would require or at least warrant, a different finding from those previously reached." 260 U.S. at 328-29. (Emphasis added).

It is, therefore, submitted that Appellants have been deprived of an opportunity to try on the merits the very constitutional issue now conceded by the State to be present: is the interference with and damage to the Appellants' homes by the construction and operation of an

adjacent freeway sufficiently intense (or "abnormal") to give rise to a "taking"?

It seems plain that any State statute capable of thus denying one's right to a day in court to test the merits, is palpably unconstitutional.

THE STATE'S ARGUMENTS MISCONCEIVE THE NATURE OF THE "ADEQUATE NON-FEDERAL BASIS" DOCTRINE. THIS DOCTRINE MAY NOT BE USED TO COMPEL THE U. S. SUPREME COURT TO ACCEPT A STATE COURT REVIEW OF A PLEADING

In making its "adequate non-federal basis" argument, the State utterly disregards the settled principle that under this doctrine, state court decisions rendered on the pleadings may not be used to blind the U. S. Supreme Court to the presence of federal issues in the pleadings.

This Court has held that where - as in the case at bench - a case reaches the Court on pleadings seeking the vindication of an appellant's federal rights, the interpretation thereof by state courts " . . . cannot . . . ." be accepted by this Court. Brown v. Western Ry. Co. (1949) 338 U.S. 294, 296. The State is precluded from setting up pleading rules as a means of foreclosing constitutional review by the U. S. Supreme Court. Rogers v. Alabama

(1904) 192 U.S. 226; First Nat. Bank v. Anderson (1926) 269 U.S. 295, 346; American Ry. Express Co. v. Levee (1923) 263 U.S. 19, 21; Davis v. Wechsler (1923) 263 U.S. 22, 24; Covington & Lexington Turnpike Co. v. Sandford (1896) 164 U.S. 578, 595-96.

Moreover, it should be noted that the State's arguments are also wrong, because the California Court of Appeal did not even purport to decide this case on any threshhold "state" issue (see Jurisd. Statement, p. A-6). Rather, the court below expressly acknowledged the presence of a federal constitutional issue before it (Jurisd. Statement, p. A-2), and pitched its decision on the proposition that regardless of merits Appellants cannot state a constitutionally-based cause of action 7/ because a state statute 8/ sweepingly provides that "[n]othing" done under the authority of a state statute can be a constitutionally compensable nuisance (see Jurisd. Statement, p. A-6). It is that

---

7/ It must also be emphasized that the California Court of Appeal itself characterized the pleading rule it invoked against the Homeowners, as "arbitrary" (see Jurisd. Statement, p. A-2, fn. 1). It does not appear open to argument that arbitrariness is an exceedingly poor basis on which to limit constitutional rights.

8/ Referring to Calif. Civil Code §3482. See Jurisd. Statement, pp. 3-4.

holding which gives rise to unconstitutionality of Calif. Civil Code §3482, because the import of that holding is that the California legislature can foreclose judicial vindication of conceded federal constitutional rights by simply passing a statute.

> "Just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute." Seaboard Air Line R. Co. v. United States (1923) 261 U.S. 299, 304.

In short, there is no "adequate" state principle capable of foreclosing an inquiry into the merits of a complaint which alleges an interference with a plaintiff's federal constitutional rights. To assert the existence of such a principle is to declare the United States Constitution operative only at the pleasure of state legislatures.

CONCLUSION

Fairly read, the State's brief concedes that the case at bench gives rise to substantial federal issues.

> "The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding 'causes of action' - when they are born, whether they proliferate, and when they die."
> United States v. Dickinson (1947) 331 U.S. 745, 748-49.

Appellants respectfully urge the Court that probable jurisdiction be noted.

Respectfully submitted,

HYMAN GOLDMAN
JERROLD A. FADEM
GIDEON KANNER

Attorneys for Appellants

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

LOMBARDY ET AL. *v.* PETER KIEWIT SONS' CO. ET AL.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 1168. Decided April 28, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.